

The Common Law and the Religious Foundations of the Rule of Law Before *Casey*

By CRAIG A. STERN *

The king must not be under man but under God and under the law, because law makes the king.¹

WHATEVER IT MAY mean,² the rule of law commands apparently universal respect—or at least receives apparently universal lip-service—among civil governments.³ Classically, the rule of law has been counterpoised to the rule of man, a rule held to be much inferior. Man is willful, apt to help friends and to harm foes even when obliged to judge fairly. Accordingly, the standard law dictionary gives these two pertinent definitions of “rule of law”: “2. The supremacy of regular as opposed to arbitrary power —Also termed *supremacy of law*. 3. The doctrine that every person is subject to the ordinary law within the jurisdiction”⁴ The rule of law is government according to

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1. 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 33 (photo. reprint 1997) (Samuel E. Thorne trans., Harvard Univ. Press 1968) (circa 1250) (footnote omitted). “*Ipse autem rex non debet esse sub homine sed sub deo et sub lege, quia lex facit regem*” (original Latin of cited quote). 2 *id.* at 33 (footnote omitted).

2. See Judith N. Shklar, *Political Theory and the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987) (arguing that “[i]t would not be very difficult to show that the phrase ‘the Rule of Law’ has become meaningless thanks to ideological abuse and general over-use. . . . The upshot is that the Rule of Law is now situated, intellectually, in a political vacuum.”).

3. Brian Z. Tamanaha, *The Rule of Law for Everyone?*, Social Science Research Network Electronic Library at <http://papers.ssrn.com/sol3/delivery.cfm/SSRNID312622code020517140.pdf?abstractid=312622> (last accessed Apr. 18, 2004). Even Marxist rulers, if not Marxist academics, have endorsed the rule of law. *Id.* at 4; see also John N. Paden, *The World Trade Organization and the Rule of Law in China: A First-Year Assessment*, VA. LAW., Apr. 2003, at 20, 21.

4. BLACK’S LAW DICTIONARY 1332 (7th ed. 1999).

rules.⁵ It requires that those who govern not only govern by law, but also see to it that they themselves are governed by law.

Necessarily, the idea that the rule of law is preferable to the rule of man is one founded upon presuppositions regarding civil justice, authority, man, and what is good. Ultimately, the system of such presuppositions is a religious system. Delve deeply enough, and the ideal of the rule of law rests upon the most fundamental beliefs.⁶ It rests upon fundamental beliefs as a concept and it rests upon fundamental beliefs as a practice. This paper attempts to limn the religious foundations of the rule of law, and especially the rule of law embraced within the common law,⁷ the basic Anglo-American jurisprudence.⁸ It also notes how a departure from even subconsciously followed religious foundations yields a change in the rule of law, marking that change in the opinion of the United States Supreme Court in *Planned Parenthood v. Casey*⁹—specifically, that Court's treatment of stare decisis. Part I of this Article will briefly note some important religious underpinnings of different legal systems in order to demonstrate the inherent connection between religion and the rule of law. Part II will explore the influence of Christianity on Anglo-American common law regarding the fundamental tenets underlying the rule of law. Then, in Part III, this Article will highlight *Planned Parenthood v. Casey* as a seminal case marking the judiciary's increasing willingness to depart from foundations—rooted in the Christianity undergirding the common law—that previously characterized the use of stare decisis. Part IV con-

5. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989). But see CHARLES FRIED, *ORDER AND LAW* 60 (1991) (“The rule of law is not quite a law of rules [citing the foregoing], but it is a law of rules, principles, customs, practices, and understandings.”).

6. See generally David Novak, *Law: Religious or Secular?*, 86 VA. L. REV. 569 (2000) (arguing that law is rooted in religion).

7. “Common law,” for purposes of this article, refers to what Black’s Law Dictionary defines as “the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity The common law is all the statutory and case law background of England and the American colonies before the American revolution.” BLACK’S LAW DICTIONARY 276 (6th ed. 1990) (internal quotes and references omitted) (emphasis added).

8. [R]eligion has inserted itself as an influential force in the determination of the legal order. In the Anglo-American world religion has functioned as one of the most concrete and specific sources of the moral Weltanschauung. As the moral ethos has served as the substratum for the legal order, religion has been one of the main foundations for both the belief and normative systems of the past.

Raymond G. Decker, *Religion and Law in the United States: A Prognosis*, 8 CAP. U. L. REV. 357, 360 (1979).

9. 505 U.S. 833 (1992).

cludes that this departure from traditional foundations will result in a lawlessness that bodes ill.

I. Non-Christian Religious Roots of the Rule of Law

Before exploring the relation between the Christian religion and the rule of law in Anglo-American common law, it may be helpful to note the relation between non-Christian religions and the rule of law in order to illustrate the impact that religion has on the idea of the rule of law.

A. Aristotelianism

Aristotle may have been the first to identify and endorse the rule of law. For example:

Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.¹⁰

Aristotle further expressed the necessity that law rule: the rule of law embraces “two senses”—“one which means obedience to such laws as have been enacted, and another which means that the laws obeyed have also been well enacted.”¹¹ In its richest meaning, then, the rule of law entails the rule of God himself:

He who commands that law should rule may thus be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of the beast. Appetite has that character; and high spirit, too, perverts the holders of office, even when they are the best of men. Law [as the pure voice of God and reason] may thus be defined as “Reason free from all passion.”¹²

Consequently, as much as possible, rule is to be exercised by divine reason, not by man so apt to depart from reason.¹³ Though not part

10. ARISTOTLE, *THE POLITICS OF ARISTOTLE* 127 (Ernest Barker trans., Oxford Univ. Press 1971–72) (1946) (III, xi, § 19; 1282b) (footnote omitted).

11. *Id.* at 175 (IV, viii, § 5; 1294a).

12. *Id.* at 146 (III, xvi, § 5; 1287a) (footnotes omitted) (bracketed words supplied by translator).

13. These principles also find expression in the *Nicomachean Ethics*. Equity is needed to supply gaps found in law by virtue of its generality. ARISTOTLE, *ETHICA NICOMACHEA* (W.D. Ross trans.) in *THE BASIC WORKS OF ARISTOTLE* 1019–20 (Richard McKeon ed., Random House 1941) (V, 10; 1137a–1138a). And yet, “we do not allow a *man* to rule, but *rational principle*, because a man behaves thus in his own interest and becomes a tyrant. The magistrate on the other hand is the guardian of justice, and, if of justice, then of equality also.” *Id.* at 1013 (V, 6; 1134a–b).

of a genuine theistic system, these propositions rest upon a religious base, in the broad sense. "One of the most conspicuous features of Aristotle's view of the universe is his thorough-going teleology."¹⁴ According to Aristotle, it is God that orders the world, inspiring motion by love.¹⁵ Man's passion draws him away from this order. The rule of law, in the fullest sense, secures a rule according to rational God and not according to passionate and imperfect men.

B. Judaism

To remove from Athens to Jerusalem, it is perhaps tautological to assert that the foundations for the rule of law in Judaism are religious. The Torah commands that judges judge according to God's law, who himself gives judgment through them.¹⁶ According to Judaism, man, the bearer of God's image, is not only by virtue of that image to be judged according to law, equal before the law, and by lawful process, but also, by virtue of that image, equipped to judge in such a fashion.¹⁷ The Hebrew Bible teaches that even God himself submits to his own law, and is faithful to his covenants, acting according to his own law when dealing with men.¹⁸

14. DAVID ROSS, *ARISTOTLE* 185 (1964).

15. *Id.* at 181, 185.

16. *See Deuteronomy* 1:16-17.

17. *See, e.g., Genesis* 9:5-6.

18. *See, e.g., Psalm* 105:8 ("He hath remembered his covenant for ever, the word which he commanded to a thousand generations."). One might think that the divine nature of Jewish law would lead to a regime of divinely inspired judges, prophets led supernaturally to resolve legal questions. Such a regime might be called a rule of God in some ways to be contrasted with a rule of law. Jewish law has firmly resisted such a direction. Perhaps the most famous passage from the Talmud on this point is the case of the Oven of Akhnai. Rabbis were disputing a question of the ritual purity of an oven. After Rabbi Eliezer b. Hyrcanus failed to convince the others by argument, he adduced proof from a tree that moved itself, a stream that reversed its flow, and walls of the study hall that began to fall, all in response to the rabbi's calling upon them to attest to the soundness of his position. The other rabbis insisted that such proofs were illegitimate. So at last Rabbi Eliezer called upon God himself:

"Again he said to them: 'If the Halakhah is in accord with me, let it be proved from Heaven.' Whereupon, a heavenly voice cried out: 'Why do you dispute with R. Eliezer, seeing that in all matters the Halakhah is in accord with him?' R. Joshua arose and exclaimed: 'It is not in heaven' [Deuteronomy 30:12]. What did he mean by this? R. Jeremiah said: 'The Torah has already been given at Mt. Sinai. We pay no attention to a heavenly voice because You [God] have already written in the Torah at Mt. Sinai, "Follow the majority"' [Exodus 23:2]. The story reaches its climax with this conclusion:

"R. Nathan met Elijah [the prophet] and asked him: 'What did the Holy One, blessed be He, do at that time [during the discussion between R. Eliezer and

C. Islam

This teaching of the Hebrew Bible appears to differ from the teaching of Islam, though a look at Islam also demonstrates the religious nature of the rule of law. "Islam denies the idea of the law of nature, and denies that man is made in the image of God, both to protect the Quran's notion of transcendence (*tanzih*), as opposed to the Bible's view of God's covenantal transcendence and immanence."¹⁹ According to the Quran, "God Himself is withdrawn in *tanzih*, or transcendence."²⁰ "He remains above."²¹ The Bible, however, holds that God, though above his creation, is present to his people and has entered into a personal relationship with them by covenant.²² The Bible also teaches that God and man are alike enough that they may share a personal relationship. Furthermore, the Quran elevates God's will above his character. Divine attributes

are to be understood finally as characteristics of the Divine will rather than laws of His nature. . . . What gives unity to all God's dealings is that He wills them all. He as Willer may be recognized from time to time by means of the descriptions given. But He does not essentially conform to any. The action of His will may be identified in this or that quality: His will of itself is inscrutable. One may not, therefore, say that God is necessarily loving, holy, righteous, clement, or relenting, in every and all relations.²³

If Allah may decree as he wills,²⁴ what failure is it for a human ruler not to do likewise?²⁵

R. Joshua?['] Elijah replied: 'He smiled, saying "My children have bested me, my children have bested me."' "

MENACHEM ELON ET AL., *JEWISH LAW (MISHPAT IVRI): CASES AND MATERIALS* 18 (1999) (quoting from Bava Mezi'a 59b of the Babylonian Talmud (bracketed material in source)); see also Elliot Dorff, *Judaism as a Religious Legal System*, 29 *HASTINGS L.J.* 1331, 1338 (1978) ("The Rabbis explicitly claimed that human judges in each generation have the authority to make decisions in Jewish law and that God no longer has the right or authority to do so"). The law, once given, is itself the rule. Human judges are to interpret the law as best they may without the aid of additional special revelation. The rule of law trumps the direct rule of God the lawgiver himself. *Id.*

19. Joseph N. Kickasola, *Islam and "The Rule of Law"* (Mar. 2003) (unpublished manuscript, on file with the author).

20. Kenneth Cragg, *The Call of the Minaret* 48 (1964).

21. *Id.*

22. See Badru D. Kateregga & David W. Shenk, *A Muslim and a Christian in Dialogue* 115-21 (1997).

23. Cragg, *supra* note 20, at 42.

24. See MALISE RUTHVEN, *ISLAM IN THE WORLD* 149-50 (Oxford Univ. Press 2000) (1984).

25. To be sure, Islam has its holy law of the Koran, the Shari'a. But the Shari'a is for Muslims alone. See Roger Scruton, *The Political Problems of Islam*, *INTERCOLLEGIATE REV.*, Fall

II. Christianity and the Rule of Law in the Common Law

The rule of law, then, has religious roots. One would expect, therefore, that the flourishing of the rule of law in the Anglo-American tradition has something to do with Christianity, the dominant religion of the culture that developed the common law.²⁶ In the sense important to our discussion at least, Christianity is a part of the common law.²⁷ The common law is the fundamental law of the Anglo-American legal system. It has been developed by judges since the middle ages, and continues to be developed by judges today. It is the law that other elements in our legal system presuppose.

Whether Christianity is a part of this common law was the subject of a famous dispute between Thomas Jefferson and Joseph Story, illustrious student and teacher of the law, and Associate Justice of the United States Supreme Court.²⁸ Jefferson traced a precedent declaring Christianity to be a part of the common law to rest ultimately on a mistranslation of a phrase of old law French. Story argued that the common law had ever recognized Christianity as true, and had framed certain legal doctrines accordingly.²⁹ But, beyond the level at which

2002, at 3, 10. And even for Muslims, the Shari'a does not support a full-blown legal order for a polity:

The writ of holy law runs through all things, but this does not mean that Islamic societies have been governed solely by the *shari'a*. On the contrary, in almost all respects relevant to the government of a large society, the *shari'a* is radically deficient. It has therefore been necessary in every epoch for the ruler to lay down laws of his own which will guarantee his power, facilitate administration, and permit the collection of taxes. But these laws have no independent legitimacy in the eyes of those compelled to obey them. They do not create a space outside religion in which freedom is the norm. On the contrary, they merely add to the constraints of the holy law the rules of a political order which is backed by no *de jure* authority, only by *de facto* power. In any upheaval they are rejected entirely as the arbitrary edicts of a usurper. Hence, there is no scope in a traditional Islamic society for the kinds of purely political development, through the patient building of institutions and secular laws, that we know in the West. Change, when it comes, takes the form of a crisis, as power is challenged from below in the name of the one true Power above.

If the only way in which a law can be legitimated is by deriving it from a command of God, then clearly all secular laws are seen as mere expedients adopted by the ruler. In such circumstances it is unlikely that any kind of constitutional, representative, or democratic government will emerge.

Id. at 10. Laws are "the arbitrary edicts of a usurper," not the stuff to support a rule of law.

26. See Russell Kirk, *The Roots of American Order* 173-75 (1974).

27. See JAMES McCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 118-40 (1971) (discussing, in light of the famous debate between Jefferson and Story, in what respects Christianity may be viewed as part of the common law).

28. See *id.*

29. See *id.*

Mr. Jefferson and Mr. Story argued the question, the religious ideas of the men that developed the common law—many of whom were prelates or at least clerics³⁰—necessarily affected their work. These religious ideas—like all ideas—have consequences. That these ideas were specifically Christian made their consequences upon the law all the more necessary, as shall appear.

To draw the connections between the Christian faith and the rule of law cultivated in the common law tradition is not to suggest that the Christian faith is the only possible basis for the rule of law. At least one very obvious fact precludes such a suggestion: the Christian faith depends upon Jewish revelation. Nor is it to deny the influence of notions from outside Christianity. Perhaps the present discussion is best seen as an attempt to show that the Christian religion provides an especially rich soil for the growth of the rule of law, and that the flourishing of the rule of law in the common law tradition owes much to the Christian faith.³¹

Four Christian ideas—doctrines, in fact—are both especially important to that religion and especially important to the rule of law in the common law tradition. The first of these is the doctrine of God himself, that is, his being and his work. Second is the doctrine of man, made in God's image. Third is the fall of man; fourth is the atonement of man. These doctrines are at the base of Christianity.³² They also happen to provide a base upon which the Anglo-American legal system could build a strong commitment to the rule of law. This section will explain the Christian doctrines and then show how different aspects of common law reflect and build upon these doctrines.

A. The Doctrine of God

1. The Being and Authority of God

The Christian faith holds that God is the "I AM," the uncreated creator of all that is, who is from everlasting to everlasting.³³ He is also

30. See RICHARD O'SULLIVAN, *CHRISTIAN PHILOSOPHY IN THE COMMON LAW* 10–12 (1947).

31. Cf. Jeffrey Brauch & Robert Woods, *Faith, Learning and Justice in Alan Dershowitz's The Genesis of Justice: Toward a Proper Understanding of the Relationship Between the Bible and Modern Justice*, 36 VAL. U. L. REV. 1, 50–60 (2001) (demonstrating that "within [the] framework [of biblically based higher law] . . . the common law developed a deep commitment to the rule of law." *Id.* at 50).

32. Besides being some of the chief teachings of the Bible, these doctrines are at least implicit in the creeds accepted by Christians from the earliest times to the present. See GERALD BRAY, *CREEDS, COUNCILS AND CHRIST* (1984).

33. See *Exodus* 3:13–14 ("And Moses said unto God, Behold, *when* I come unto the children of Israel, and shall say unto them, The God of your fathers hath sent me unto you;

the God of Abraham, Isaac, and Jacob, a God of relationship, of covenant.³⁴ In this way, he is both transcendent and immanent. According to the New Testament, he is love.³⁵ His love is expressed, in part, in providing law for all his creation, understood both as rules describing what is, and as rules prescribing what ought to be. His law comes from his will, but his will expresses his eternal, unchanging nature. "The being of God is a kind of law to his working"³⁶ As Sir William Blackstone puts it, God is wise, and so his law is perfectly suited to his creation.³⁷ God also keeps the covenants and the laws he makes. David declares of him, "thou hast magnified thy word above all thy name."³⁸

Within the Christian tradition, God holds all authority,³⁹ but authorizes others to exercise portions of that authority as his ministers.⁴⁰ Exercising authority for God does not make one a god. Caesar and God are distinct: "Render to Caesar the things that are Caesar's and to God the things that are God's."⁴¹ And yet Caesar is appointed by God to administer a share of God's justice.⁴² According to the Christian

and they shall say to me, What is his name? what shall I say unto them? And God said unto Moses, I AM THAT I AM: and he said, Thus shalt thou say unto the children of Israel, I AM hath sent me unto you."); *John* 8:56-59 ("Your father Abraham rejoiced to see my day: and he saw it, and was glad. Then said the Jews unto him, Thou art not yet fifty years old, and hast thou seen Abraham? Jesus said unto them, Verily, verily, I say unto you, Before Abraham was, I am. Then took they up stones to cast at him: but Jesus hid himself, and went out of the temple, going through the midst of them, and so passed by.") (italics in the Authorized Version of the Bible signify words with no verbal equivalent in the original text).

34. See *Exodus* 3:14-15 ("And God said unto Moses, I AM THAT I AM: and he said, Thus shalt thou say unto the children of Israel, I AM hath sent me unto you. And God said moreover unto Moses, Thus shalt thou say unto the children of Israel, the LORD God of your fathers, the God of Abraham, the God of Isaac, and the God of Jacob, hath sent me unto you: this is my name for ever, and this is my memorial unto all generations."); *Matthew* 22:31-32 ("But as touching the resurrection of the dead, have ye not read that which was spoken unto you by God, saying, I am the God of Abraham, and the God of Isaac, and the God of Jacob? God is not the God of the dead, but of the living."); *Mark* 12:26-27 (parallel passage); *Luke* 20:37-38 (parallel passage).

35. See 1 *John* 4:8, 16.

36. 1 RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY 150 (J.M. Dent & Sons 1925) (1594).

37. See 1 WILLIAM BLACKSTONE, COMMENTARIES *40.

38. *Psalms* 138:2.

39. See, e.g., *Matthew* 28:18.

40. See *Romans* 13:1-6.

41. *Mark* 12:17. When asked by those trying to trap him whether Jews should pay tribute to Caesar, Jesus asked whose image was on the tribute money and, being told it was Caesar's, spoke this famous aphorism. *Id.*

42. *Romans* 13:1-6:

Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation. For rulers are not a terror to good works, but to the evil. Wilt

understanding, civil government is not divine; rather it is invested, like any human authority, with a limited commission from God. As such, civil government is under God and his law, and obliged to reflect God's justice.⁴³

The history of Anglo-American common law demonstrates a profound commitment to these truths. The common law proper operated among a diversity of authorities, civil and ecclesiastic.⁴⁴ Its range was limited. For example, actions in the common law court began with a royal document called "the original writ . . . the source of the jurisdiction of the court."⁴⁵

The Court of Common Pleas was historically, and in legal theory, a court of delegates whose authority was not general, but derived from an *ad hoc* commission separately given for every individual case. Hence the court had no powers beyond those conferred by the original writ and could not go beyond the four corners of that document.⁴⁶

The king's writs, issued to bring cases before the English common law courts, applied only to specific cases; they supported no broad assertion of authority by the courts. And so "the rule of writs is the rule of law."⁴⁷ Authority of the common law courts was limited by law.

The common law was but one of several competing legal systems.⁴⁸ Professor Harold Berman largely ascribes the rise of the rule of law in the West to the diversity of legal authorities.⁴⁹ This very diver-

thou then not be afraid of the power? do [sic] that which is good, and thou shalt have praise of the same: For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to *execute* wrath upon him that doeth evil. Wherefore ye must needs be subject, not only for wrath, but also for conscience sake. For for this cause pay ye tribute also: for they are God's ministers, attending continually upon this very thing.

43. See JACQUES ELLUL, *THE THEOLOGICAL FOUNDATION OF LAW* 123–24 (Marguerite Wieser trans., The Seabury Press 1969) (1946): "The scriptures clearly teach the subordination of the state to law. The state is created *for the benefit of law*. . . [L]aw gives a reason for being and a purpose to the state. The latter is the servant, not the master, of law."

44. See, e.g., 1 BLACKSTONE, *supra* note 37, at *63 ("The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws*, that are by custom observed only in certain courts and jurisdictions.")

45. See Theodore F.T. Plucknett, *A Concise History of the Common Law* 408 (5th ed. 1956).

46. *Id.*

47. HAROLD J. BERMAN, *LAW AND REVOLUTION* 458 (1983).

48. See PLUCKNETT, *supra* note 45, at 207–14; see also BERMAN, *supra* note 47, at 39 ("Blackstone's concept of two centuries ago that we live under a considerable number of different legal systems has hardly any counterpart in contemporary legal thought.")

49. See BERMAN, *supra* note 47, at 10, 215, 292, 294, 536–37.

sity of legal authorities required rules limiting their respective operations. And beneath this diversity—perhaps most clearly in the diversity that embraced church as well as kingdom⁵⁰—lay the belief that ultimate authority rests with God, who has apportioned the ministerial exercise of authority to diverse human instruments.

A famous monument to this diversity of authority is the Magna Carta. There, King John pledged, "In the first place, we have granted to God, and by this our present charter confirmed, for us and for our heirs forever, that the English church shall be free, and shall hold its rights entire and its liberties uninjured . . ." ⁵¹ Certainly, this pledge would have been idle had not the king been thought to have been bound to his words. Under God, and before God, a king must keep his pledge, like God himself who keeps his own pledge.⁵² Architect of the Magna Carta, Archbishop Stephen Langton of Canterbury, manifests in the charter not only his mastery of canon law, but also the familiarity with Holy Scriptures to be expected from the man who is credited with articulating the Bible into the chapter divisions we use to this day.

Thus, the Magna Carta stands for a kingship limited in its authority by law. The king is not God, but under God and God's law, and so obliged to keep his word. The king is limited in his power over the church. He exercises only a partial government. Beyond these things, however, the Magna Carta commits the crown to proceeding according to law: "No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land."⁵³ If God himself is just and adheres to the law, so must his minister proceed according to the law.⁵⁴ And proceeding

50. See JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM* 67-85 (2001) (discussing and presenting materials on this diversity in England).

51. *MAGNA CARTA*, ch. 1, reprinted in *SOURCES OF OUR LIBERTIES* 11 (Richard L. Perry & John C. Cooper eds., 1978).

52. That Pope Innocent III declared the first Magna Carta of 1215 void for having been exacted without his consent only emphasizes that such a pledge, properly executed, was binding and not just a concession to superior power. The charter enjoyed repeated reissues later that did validly bind sovereigns. See *id.* at 4. "[E]ventually it was confirmed at least thirty times before the close of the Middle Ages." ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* 54 (Liberty Press 1985) (1966).

53. *MAGNA CARTA*, ch. 39, reprinted in *SOURCES OF OUR LIBERTIES*, *supra* note 51, at 17 (footnote omitted).

54. The great importance of Magna Carta was that it introduced a . . . theory of law, under which the king could be legally bound. It is most unlikely that any of those who attached their seals to the Great Charter realized this, but it is implicit in chapter 39. They did not, of course, reject the idea that the king was bound by

according to law entails designating arbiters of judgment—courts—as separate from organs exercising will or force.⁵⁵

2. God the Lawgiver

The method of the common law itself manifests this rule of law notion that civil government should pursue judgment and not simply will or force. Consider the development of law by judges in deciding the cases before them. Common law judges were sworn to decide cases according to the law.⁵⁶ They were directed not to innovate or to create law.⁵⁷ They held no legislative power. Rather, judges were to declare and apply what was already law before that declaration. Law ruled, and judges were but its oracles.⁵⁸

This rule of law in the courts of the common law reflected the Christian doctrine of God in at least two distinct ways. First, civil justice mirrored God's justice in its commitment to law. The law established the standard, the breach of which supported a claim for redress. In turn, any redress was duly governed by law in its process and remedy. Justice was a matter of judgment in applying and vindicating the law. But, second, this method proceeded on the assumption that law existed before courts had occasion to declare and apply it. If judges were to discover the law and not make it, it must have been there to discover. To some degree, common law is the custom of the land—conventions from time immemorial. But to a great degree, common law is the law of nature, the law prescribed—as Christianity holds—by God himself for his creation.⁵⁹

divine law and by the law of nature, but to this they added the third concept, "the law of the land." This is not law which anyone has commanded. It consists of those rules which are recognized as being obligatory because they have been developed through the common custom of the realm. This law of the land is binding on the king as well as on his subjects.

ARTHUR L. GOODHART, *LAW OF THE LAND* 27 (1966).

55. See *THE FEDERALIST* No. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (stating that the judiciary "may truly be said to have neither FORCE nor WILL, but merely judgment"); see also *id.* No. 47, at 249 (James Madison) (stating that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

56. See *infra* text accompanying note 65.

57. See *id.*

58. See 1 BLACKSTONE, *supra* note 37, at *69; BRIAN TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT* 1150–650, at 30 (noting that Roman and canon lawyers at the turn of the thirteenth century could distinguish making law from finding law).

59. See 1 BLACKSTONE, *supra* note 37, at *39–40:

[A]s man depends absolutely upon his maker for every thing, it is necessary that he should in all points conform to his maker's will. This will of his maker is called

As Blackstone explains, in the legal treatise standard in America at the Founding:⁶⁰

This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.⁶¹

Men know the law of nature by reason and, more perfectly, by consulting divine law “to be found,” Blackstone declared, “only in the holy scriptures.”⁶² Municipal law, such as the common law of England, “is properly defined to be ‘a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.’”⁶³ Except where it reflects custom on matters indifferent, the common law reflects true right and true wrong, the law of nature.⁶⁴

It follows then, if a supposed rule of the common law derogated from the law of nature, it in fact was not law at all. Blackstone wrote of adherence to pre-existent law by courts:

[I]t is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new

the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

Cf. JAMES R. STONER, JR., *COMMON LAW AND LIBERAL THEORY* 19 (1992) (stating that common law authority Sir Edward Coke “apparently takes it for granted that divine authority lies behind the law”).

60. In political writings of the Founders, the number of citations to Blackstone was exceeded only by the number of citations to the Bible and to Montesquieu. See JOHN WITTE JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 7 (2000).

61. 1 BLACKSTONE, *supra* note 37, at *41.

62. 1 *id.* at *42.

63. 1 *id.* at *44.

64. See, e.g., 1 *id.* at *42:

Upon these two foundations, the law of nature and the law of revelation [this second being “the law of nature, expressly declared so to be by God himself,” 1 *id.*], depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy: for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former.

judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.⁶⁵

But a pre-existent judicial statement of the law might be erroneous, might not state accurately what is truly pre-existent law. Consequently, the rule of adherence to precedent "admits of exception, where the former determination is most evidently contrary to reason; much more, if it be clearly contrary to the divine law."⁶⁶ Though some may interpret this exception to allow for judges to create new law where they determine that a previous understanding of law was incorrect, Blackstone expressly dismisses this possibility. Instead, he wrote:

But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.⁶⁷

The English common law presupposed a just rule extant when the case arose and when the case was to be decided.⁶⁸ Customs, sifted and supplemented by God's own law of nature—revealed in the Bible and in reason—provided law for the courts to apply. Such a law of nature requires a legislator, and the Christian God—creator, lawgiver, and author of revelation—has supplied this necessary element to the common law.⁶⁹

65. 1 *id.* at *69.

66. 1 *id.*

67. 1 *id.* at *70.

68. See *Rogers v. Tennessee*, 532 U.S. 451, 472–79 (2001) (Scalia, J., dissenting) (explaining the common law doctrine that judges discover, not make, law); see also BRUNO LEONI, *FREEDOM AND THE LAW* 85–86 (3d ed. 1991):

According to the English principle of the rule of law, which is closely connected with the whole history of the common law, rules were not properly the result of the exercise of the arbitrary will of particular men. They are the object of a dispassionate investigation on the part of courts of judicature [T]he attitude of common-law judges towards the *rationes decidendi* of their cases . . . has always been much less that of a legislator than that of a scholar trying to ascertain things rather than to change them.

69. Contrast with this view the equally religious view that rejects a transcendent legal order:

Law, says the new school, has no demonstrable existence outside the facts of life. The conception of "law" as a body of determinate rules enjoying some kind of metaphysical existence, and having a definite content which only awaits discovery

3. God the Judge

Yet another aspect of the Christian doctrine of God supported the rule of law. God is the judge of all mankind.⁷⁰ He holds men to his law, and to their oaths.⁷¹ When kings swore to uphold the law, and when judges swore to decide cases according to the law, they understood that God would vindicate his law, and would require them to keep their solemn word. This understanding cautioned those administering the law to submit to law, whatever opportunity they might have had to evade the penalties of merely human justice.⁷²

B. The Doctrine of Man

The Christian doctrine of God is most fundamental to the rule of law in the common law tradition. But a chief link between the doctrine of God and the rule of law is the doctrine of man that holds him to be created in God's image:

And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth. So God created man in his *own* image, in the image of God created he him; male and female created he them.⁷³

Because man is made in God's image, he can enjoy a relationship with God that may encompass covenant;⁷⁴ that may entail the human ad-

by technical reason, is a mere chimera. There certainly are rules of law, in the sense that people print them and pronounce them, and try to follow them as best they can be understood, but there is no warrant whatever for supposing they "exist" in any other sense than these. "Law" is a shorthand term for certain things that are done and said and written by human beings. If a question of law is "doubtful," that can only mean that, in point of fact, the people who have looked into the relevant data and argued it over do not agree on an answer, and this in turn means that there is no determinate and single correct answer, for there is no standard, outside the admittedly variant beliefs of the relevant people, to which one may look.

CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* 161-62 (1960).

70. See *Genesis* 18:25; *Acts* 10:42.

71. See *Revelation* 21:8, 27.

72. See ARTHUR E. SUTHERLAND, *THE CHURCH SHALL BE FREE* 5-7 (1965) (describing the fear of God and the piety of such monarchs as John, William the Conqueror, and Henry II); see also BERMAN, *supra* note 47, at 479 (arguing that royal justice was more objective than that available elsewhere, in part because royal judges "owed an allegiance to the law, and to God, which was considered to be even higher than their allegiance to the king," the former allegiance to be honored at the peril of their souls).

73. *Genesis* 1:26-27.

74. See, e.g., *Genesis* 15. "With respect to covenants between God and man in Scripture, we may give the following definition: *A covenant is an unchangeable, divinely imposed legal*

ministration of God's authority and justice;⁷⁵ that may require the exercise of judgment, applying God's law, or any law at all for that matter.⁷⁶ Furthermore, because he is made in God's image, man may enjoy relationships with fellow man in enjoying these privileges and exercising these faculties.⁷⁷ The support given the rule of law by the Christian doctrine of God would be incomplete without the Christian doctrine of man.

1. The Idea of Due Process

Beyond this aspect of man made in God's image and so enabled to act for and with God, lies the aspect of man made in God's image and therefore worthy of the respect due such a creature. That is, as a subject of the law, man's bearing God's image requires that he be given the benefit of the rule of law.⁷⁸ From the very first biblical account of judgment,⁷⁹ the rabbis derived the principle of due process, the principle that men deserve notice of charges of wrongdoing and the opportunity to answer them before their judge.⁸⁰ Directly after the sin of Adam and Eve, God, though omniscient, asks Adam, "Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat?"⁸¹ After listening to Adam's answer, he asks Eve, "What is this that thou hast done?"⁸² After listening to Eve's answer, but without speaking to the serpent at all, he declares his judgment upon all three of-

agreement between God and man that stipulates the conditions of their relationship." WAYNE GRUEDEM, *SYSTEMATIC THEOLOGY* 515 (1994).

75. See *Romans* 13:1-6.

76. See, e.g., *Genesis* 9:5-6.

77. See, e.g., *id.* at 2:18-25.

78. Robert P. George, *Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition*, 46 *Am. J. Juris.* 249, 256 (2001):

Reflection on the relationship of human reason and freedom—and the theological significance of this relationship in a tradition crucially shaped by the biblical account of man as a possessor of spiritual powers and, indeed, as an *imago dei*—helps, I believe, to make sense of the centrality of law, and the rule of law, in Western thought about political morality. In particular, it helps to explain the stress laid upon the ideal of the rule of law as a fundamental principle of political justice in the strand of the tradition stretching from early and medieval Christian thinkers to John Paul II.

79. See *Genesis* 3. Adam and Even, first man and woman according to the Bible, broke God's law and confronted God for judgment.

80. See ELON ET AL., *supra* note 18, at 587; see also R.H. Helmholz, *The Development of Law in Classical and Early Medieval Europe: The Bible in the Service of the Canon Law*, 70 *CHI-KENT L. REV.* 1557, 1573-77 (1995) (explaining that canon law found fundamental procedural principles in *Genesis* 3).

81. *Genesis* 3:11.

82. *Id.* at 3:13.

fenders. Men, unlike the serpentine embodiment of the fallen angel, and although sinners, receive from God the respect due those made in his image. God charges, listens, and then judges, according to his previously declared law. He treats Adam and Eve much as King John would promise to treat his subjects in the Magna Carta.⁸³

2. The Idea of Legal Equality

Human dignity entails being treated according to law. As all humans equally bear the image of God, so all are to enjoy equality before the law: "Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty: *but* in righteousness shalt thou judge thy neighbour."⁸⁴ Adherence to this principle is one of the precepts that A.V. Dicey marks as components of the common law commitment to the rule of law:

We mean . . . when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to the constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority.⁸⁵

Very different from other ancient near eastern legal codes, the Torah prescribes one law regarding civil matters.⁸⁶ There is no grading of penalties based upon the status of the wrongdoer or upon the status

83. See *supra* text accompanying note 53.

84. *Leviticus* 19:15.

85. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 114 (Liberty Classics 1982) (1885) (footnote omitted). Magna Carta had provided for an equality of penal fines irrespective of whether the one being fined was a "free man," a "merchant," or a "villain." MAGNA CARTA, ch. 20, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 51, at 15.

86. Compare HAMMURABI'S LAWS 105-07 (M.E.J. Richardson trans., Sheffield Academic Press 2000) (prescribing compensation and fees for injury and assault, varying with the status of the victim), with *Exodus* 21 (prescribing compensation for injury, fundamentally neutral with respect to the status of the victim).

of the victim. Instead, there is one law for all. Insofar as all equally bear God's image, all are to enjoy equality before the law.⁸⁷

C. The Doctrine of the Fall

Just as all men are made in the image of God, so the Christian faith teaches also that all men are sinners, fallen from their created state.⁸⁸ Jesus Christ alone, the "God-Man," is without sin.⁸⁹ Consequently, no ordinary man exercising a ministry from God exercises it exactly and without fail as God would have him exercise it. Imperfect men do not keep covenant, do not judge according to the law, do not treat other men as equals before the law. However divine their calling, or perhaps because their calling is divine, they fall short.

The common law acknowledges this third doctrine, the fall of man, in many of the principles we have already rehearsed. For example, recognizing the limits and diversity of human jurisdictions fits well with recognizing the sinful state of man. Unlimited authority is not for sinners, but for God alone. The method of the common law, requiring that judges decide only the cases before them, and that they give a reasoned opinion in support of that decision, combines epistemological modesty with the distrust of judgment without justification.

Another principle directly related to the fall of man is *stare decisis*, the principle that courts adhere to rules previously announced in judicial opinions. Chancellor James Kent of New York wrote:

A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public, if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless

87. See O'SULLIVAN, *supra* note 30, at 31-35.

88. See *Psalm* 14:1-3; 53:1-3; *Romans* 3:9-12.

89. See *Hebrews* 4:15.

by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law.

The English courts seem now to consider it to be their duty to adhere to the authority of adjudged cases, when they have been so clearly, and so often, or so long established, as to create a practical rule of property, notwithstanding they may feel the hardship, or not perceive the reasonableness of the rule. There is great weight in the maxim of Lord Bacon, that "*optima est lex, quae minimum relinquit arbitrio iudicis; optimus iudex, qui minimum sibi.*"⁹⁰

Judges, as they discerned the customs and rules that composed the common law, had no discretion to alter the law, or even to depart from precedents unless clearly erroneous. This principle not only stabilized law, as Kent remarks, but also checked indulgence of any judicial impulse to pursue passion rather than law, as Aristotle might say.⁹¹ Dean Roscoe Pound attacked such constraints on judicial will as a product "of men who believed in original sin," and predicted that "[m]any unhappy results" would follow:

It is hardly too much to say that the ideal judge is conceived of as a pure machine. Being a human machine and in consequence tainted with original sin, he must be allowed no scope for free action. Hard and fast rules of evidence and strict review of every detail of practice by a series of reviewing tribunals are necessary to keep him in check. In many states he may not charge the jury in any effective manner; he must rule upon and submit or reject written requests for academically stated propositions of abstract law; he must not commit any error which might possibly prejudice a party—whether in fact there is prejudice or not. Dunning has pointed out that the Puritan in America was able to carry into effect what in England could only be speculative opinions. Hence in America, in addition to the ritual of justice, belonging to a past age of formalism that put gold lace and red coats on the skirmish line, we have a machinery of justice devised to keep down the judicial personality which has made legal procedure in some sort an end in itself.⁹²

Though not explicitly attacking *stare decisis*, Pound exposes the connection between a common law principle that holds judges to decisions previously announced and the Christian teaching that all men sin; they fall short of their calling.

90. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *475-78 (O.W. Holmes, Jr. ed., Little, Brown 1873) (1826) (footnote omitted). The Latin quoted at the end of this excerpt translates to, "that law is best which leaves least to the decision of the judge; that judge best who leaves least to himself."

91. See *supra* notes 10-15 and accompanying text.

92. Roscoe Pound, *Puritanism and the Common Law*, 45 AM. L. REV. 811, 826-27 (1912):

D. The Doctrine of the Atonement

Sin finds its remedy under the fourth fundamental Christian doctrine, the atonement, worked by Jesus Christ. The orthodox understanding of the atonement sees Christ's death as satisfying the just wrath of God over man's sins. Desiring to save mankind from the full consequences of their sin, but unwilling to alter or to violate the law that condemned mankind to those consequences,⁹³ God suffered those consequences in union with man.⁹⁴ He did so by sending his only son, who was both human and God, to be punished as a man. In this way, God satisfied justice while working mercy.⁹⁵ God himself adhered to the law. He did not alter it, or find some pragmatic remedy apart from it. Instead, Jesus Christ, the son of God, was sent to earth to live a perfect life under the law, and according to the Bible, Christ did so. He also was sent to die. God the Son, who is one with God the Father from eternity, would cry from the cross to his father, "My God, my God, why hast thou forsaken me?"⁹⁶ When Christ died, the Trinity itself split, in order to fulfill the law while providing forgiveness to humans. The doctrine that God himself keeps the law—his own law—even at so a great a cost to himself, demonstrates his most profound commitment to the rule of law. Man cannot hope to achieve higher. Neither the magnitude of God's available authority, nor the magnitude of the result, nor the magnitude of the cost, justified the departure from the law. How much less, then, should man, bearing God's image, depart from the law?⁹⁷ Henry Bracton, thirteenth century father of the common law,⁹⁸ explained:

93. See *Exodus* 34:7; *Matthew* 5:17–20.

94. See *Isaiah* 53; *Galatians* 2:20.

95. See *Romans* 1:16–17:

For I am not ashamed of the gospel of Christ: for it is the power of God unto salvation to every one that believeth; to the Jew first, and also to the Greek. For therein is the righteousness of God revealed from faith to faith: as it is written, The just shall live by faith[;]

see also *Romans* 3:26 ("To declare, I say, at this time his righteousness: that he might be just, and the justifier of him which believeth in Jesus.").

96. *Matthew* 28:46c; *Mark* 15:34c (quoting *Psalms* 22).

97. F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 101 (1920):

Law had been conceived as existing independently of the will of any ruler, independently even of the will of God; God himself was obedient to law; the most glorious feat of his Omnipotence was to obey law:—so the king, he is below the law, though he is below no man; no man can punish him if he breaks the law, but he must expect God's vengeance.

98. See JOHN C.H. WU, *FOUNTAIN OF JUSTICE* 71–77 (1955) (describing the importance of Bracton, and his title to being acclaimed father of the common law).

The king must not be under man but under God and under the law, because law makes the king, Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power. [F]or there is no *rex* where will rules rather than *lex*. Since he is the vicar of God, And that he ought to be under the law appears clearly in the analogy of Jesus Christ, whose vicegerent on earth he is, for though many ways were open to Him for his ineffable redemption of the human race, the true mercy of God chose this most powerful way to destroy the devil's work, he would use not the power of force but the reason of justice. Thus he willed himself to be under the law that he might redeem those who live under it. For He did not wish to use force but judgment.⁹⁹

The rule of law can receive no higher endorsement, in fact no greater sanctity, then it does from this distinctive doctrine of the Christian faith. Whatever diverse sources give rise to the rule of law, whatever prudence and welfare enhancements support it, the rule of law scarcely could find more committed supporters than those who, like Bracton, view human government and law from a thoroughgoing and orthodox Christian worldview.

Here a corollary accompanying such a profound commitment to the rule of law should be noted. That is, if God himself adheres to the rule of law, so should civil government. This should be true, even to the extent that this adherence puts some matters beyond the authority of civil government. If parenting, or cultivation of the arts, or the provision of medical care, cannot be done properly within the rule of law, they ought not to be done by civil government, at least if its commission is to execute justice. The rule of law, then, is not only a precept for means, but also a precept for ends.

III. A Post-Christian Notion of the Rule of Law

The rule of law flourished in the common law under the influence of the Christian faith. Beyond the four fundamental doctrines of the faith discussed here, many Christian principles support the rule of law.¹⁰⁰ One might well wonder, then, how abandoning the Christian faith might affect the rule of law today. If America has become in-

99. 2 BRACTON, *supra* note 1, at 33 (footnotes and original brackets omitted). "Bracton's book is the crown and flower of English medieval jurisprudence." 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 206 (photo. reprint 1968) (1895). The beginning of this passage is famous also for being the words Chief Justice Edward Coke quoted to James I during their argument on Sunday, November 13, 1608. The king became enraged, and nearly struck Coke with his fist. See CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE* 303-06 (1957).

100. See, e.g., *Genesis* 1:28 (recording that man is to exercise dominion over the earth); *Matthew* 5:17-18:

creasingly secularized,¹⁰¹ what principled limits exist to curb civil authority; what pre-existent, known precepts supply rules for new cases; what gives rise to the equality of all before the law; what warns men from pretending to the prerogatives of the perfect? What, indeed, replaces the atonement as the profound sign and call to the rule of law?

In fact, recent jurisprudence has followed the trajectory one might expect from a departure from the Christian worldview. Perhaps the most noteworthy example is the joint opinion in *Planned Parenthood v. Casey*.¹⁰² In *Roe v. Wade*,¹⁰³ the United States Supreme Court struck down state prohibitions on abortion. Rather than settling the legal issue of abortion, however, *Roe* became the focus of continuing controversy:

Think not that I am come to destroy the law, or the prophets: I am not come to destroy, but to fulfill. For verily I say unto you, Till heaven and earth pass, one jot or one tittle shall in no wise pass from the law, till all be fulfilled[;]

see also *Timothy* 2:2 (exhorting prayer for kings “that we may lead a quiet and peaceable life in all godliness and honesty”).

101. See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 6-7 (1993):

[O]ne sees a trend in our political and legal cultures toward treating religious beliefs as arbitrary and unimportant, a trend supported by rhetoric that implies that there is something wrong with religious devotion. More and more, our culture seems to take the position that believing deeply in the tenets of one’s faith represents a kind of mystical irrationality, something that thoughtful, public-spirited American citizens would do better to avoid[;]

see also Harold J. Berman, *The Interaction of Law and Religion*, 8 *CAP. U. L. REV.* 345, 351 (1979):

The radical separation of law and religion in twentieth century American thought—I am speaking now not of constitutional law but of jurisprudence, of legal philosophy—creates a serious danger that law will not be respected. . . . In the last analysis, what deters crime is the tradition of being law-abiding, and this in turn depends upon a deeply or passionately held conviction that law is not only an instrument of secular policy but also part of the ultimate purpose and meaning of life.

102. 505 U.S. 833 (1992) (reaffirming a constitutionally protected right to abortion, though the justices in the majority failed to agree on its contour).

103. 410 U.S. 113 (1973). *Roe* held that a constitutional right of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy,” *id.* at 153, and that a state therefore cannot proscribe abortion except when its interest “in the potentiality of human life” becomes considerable in the “stage subsequent to viability,” *id.* at 164–65. Even at this stage, however, the state may not proscribe abortion “where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Id.* at 165. *Roe* explicitly referred here to its companion case of *Doe v. Bolton*, 410 U.S. 179 (1973), wherein the Court listed “factors [that] may relate to health” and affect “medical judgment” to include “physical, emotional, psychological, familial, and the woman’s age.” *Id.* at 192. *Roe* with *Doe*, therefore, restricted nearly to nonexistent any state authority to proscribe abortion.

[A]bortion was not just another question on which the Supreme Court had made a constitutional ruling. Many members of the public considered it the most momentous and pivotal social issue dividing American society, involving the basic question of when life began, what right women had over their own bodies and their own fate, and what power other members of the family had over that choice. Those who considered abortion the taking of human life would not stand by and let matters rest. They would come back again and again to attack *Roe v. Wade* either directly or indirectly—by putting pressure on state legislatures to pass laws that would impose financial and medical obstacles on abortions. Women who considered the right to an abortion part of their basic human destiny would not yield in their insistence that the right be preserved in all respects and that no financial or medical barrier be placed in the way of that choice.¹⁰⁴

The Court itself repeatedly revisited the abortion issue as its composition appeared to shift gradually toward those reluctant to strike down state limitations on abortion.¹⁰⁵ By the time *Casey* arose, “the outlook for continued recognition of the abortion right was doubtful.”¹⁰⁶ When the Court in *Casey* announced its reaffirmation of *Roe*, the “decision was almost totally unexpected.”¹⁰⁷

For purposes of this essay, the most significant aspect of the Court’s opinion in *Casey* is its reformulation of the doctrine of stare decisis:¹⁰⁸

104. LEON FRIEDMAN, *Introduction to THE SUPREME COURT CONFRONTS ABORTION* 5–6 (Leon Friedman ed., 1993).

105. *See id.* at 6–11.

106. *Id.* at 11–12.

107. *Id.* at 14. Even Chief Justice William Rehnquist did not expect the decision, having circulated a majority opinion against *Roe*. The recently released papers of Associate Justice Harry Blackmun explain that Associate Justice Anthony Kennedy had switched his vote to give abortion the five-to-four support of the Court. *See Charles Lane, How Justices Handle a Political Hot Potato*, WASH. POST, Mar. 5, 2004, at A1.

108. Four years before *Casey*, Professor Henry Paul Monaghan adumbrated the Court’s approach to stare decisis:

There is . . . a . . . perhaps more universal justification for the application of stare decisis to contested matters, one that also arises from a rationale concerned with stability and continuity. Namely, the Court must strive to demonstrate—at least to elites—the continuing legitimacy of judicial review. A general judicial adherence to constitutional precedent supports a consensus about the rule of law, specifically the belief that all organs of government, including the Court, are bound by the law. At first blush it may seem perverse to defend the idea that the Court maintains its subservience to the fundamental law by upholding decisions that depart from that law. But this difficulty is not insurmountable. What the Constitution requires is often a matter for debate, and once having been adequately canvassed and resolved by the Court, an issue might presumptively remain at rest. Even when the prior judicial resolution seems plainly wrong to a majority of the present Court, adherence to precedent can contribute to the important notion

The Court's duty in the present cases is clear. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe's* essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe's* original decision, and we do so today.¹⁰⁹

Stare decisis in *Casey* is not a method for seeking truth with humility, sensitive to the reliance placed by others upon earlier judicial decisions.¹¹⁰ The *Casey* Court dismisses from its consideration the enor-

that the law is impersonal in character, that the Court believes itself to be following a "law which binds [it] as well as the litigants."

...
To my mind, this rule of law argument does not suffer from criticism that the man in the street is unaware of the overruling of "small" precedents and that, in any event, he would expect the Constitution and not the Court's precedents to control adjudication. For me, the real focus of rule of law theories about the Supreme Court in the main is elites, at least "the reasoning classes." The concern is to contain, if not minimize, the existing cynicism that constitutional law is nothing more than politics carried on in a different forum. . . . My submission is that the Court's institutional position would be weakened were it generally perceived that the Court itself views its own decisions as little more than "a restricted railroad ticket, good for this day and train only." If courts are viewed as unbound by precedent, and the law as no more than what the last Court said, considerable efforts would be expended to get control of such an institution—with judicial independence and public confidence greatly weakened.

Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752-53 (1988) (footnotes omitted).

109. *Planned Parenthood v. Casey*, 505 U.S. 833, 868-69 (1992).

110. To be sure, constitutional law is not—or at least should not be—common law. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . and . . . Treaties . . . shall be the supreme Law of the Land . . ."). And commentators of diverse stripe have explained that full-blown stare decisis may be out of place in constitutional law. See, e.g., *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-13 (1932) (Brandeis, J., dissenting) (marking the relative difficulty of legislative correction by amendment); RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 283-99 (1977) (locating the rule of law for constitutional law in adherence to the text of the Constitution rather than to precedent); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986):

In my judgment, however, the unique interpretive role of the Supreme Court with respect to the Constitution demands some flexibility with respect to the call of stare decisis. Because we Justices of the United States Supreme Court are the last word on the meaning of the Constitution, our views must be subject to revision over time, or the Constitution falls captive to the anachronistic views of long-gone generations[;]

see also William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736-37 (1949):

mity of any error in *Roe*, "if error there was."¹¹¹ Instead, the use of *stare decisis* in *Casey* was a prop to preserve the power of the Court.

The rule of law becomes the rule of the Court, for there is no true law apart from the Court:

Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.¹¹²

The Court is the organ of the rule of law. Without a powerful Court, there is no real law. How could it be otherwise when "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life[?]" Beliefs about

The place of *stare decisis* in constitutional law is even more tenuous. A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it. So he comes to formulate his own views, rejecting some earlier ones as false and embracing others. He cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him.

This reexamination of precedent in constitutional law is a personal matter for each judge who comes along. When only one new judge is appointed during a short period, the unsettling effect in constitutional law may not be great. But when a majority of a Court is suddenly reconstituted, there is likely to be substantial unsettlement. There will be unsettlement until the new judges have taken their positions on constitutional doctrine. During that time—which may extend a decade or more—constitutional law will be in flux. That is the necessary consequence of our system and to my mind a healthy one. The alternative is to let the Constitution freeze in the pattern which one generation gave it. But the Constitution was designed for the vicissitudes of time. It must never become a code which carries the overtones of one period that may be hostile to another.

So far as constitutional law is concerned *stare decisis* must give way before the dynamic component of history. Once it does, the cycle starts again. Today's new and startling decision quickly becomes a coveted anchorage for new vested interests. The former proponents of change acquire an acute conservatism in their new *status quo*. It will then take an oncoming group from a new generation to catch the broader vision which may require an undoing of the work of our present and their past.

These observations serve only to accentuate the difference between the *stare decisis* of *Casey* and the *stare decisis* of the common law.

111. *Casey*, 505 U.S. at 869.

112. *Id.* at 868.

these matters could not define the attributes of personhood were they formed under compulsion of the State.”¹¹³ Attributes of personhood—the status that merits for humans their legal protection—derive from one’s own religious beliefs, not from some transcendent order, some ultimate truth. It is the autonomous definition by each of reality that gives humans dignity. But for our polity, it takes a Court to bring law to such beings, a role Justice Scalia calls the product of a “Nietzschean vision of . . . unelected, life-tenured judges—leading a Volk who will be ‘tested by following,’ and whose very ‘belief in themselves’ is mystically bound up in their ‘understanding’ of a Court that ‘speak[s] before all others for their constitutional ideals.’”¹¹⁴ The rule of law has become the rule of man—those who happen to sit on the bench of the United States Supreme Court.¹¹⁵

113. *Id.* at 851.

114. *Id.* at 996 (Scalia, J., concurring in the judgment in part and dissenting in part); see also Charles Fried, *Constitutional Doctrine*, 197 HARV. L. REV. 1140, 1143 (1994) (footnotes omitted):

The edifice of precedent in doctrine cannot be built upon the shifting sands of expectation, because to speak of expectation begs the question. I suspect that an intuition of this sort may account for the false note detected in the lengthy and somewhat extravagant protestations of fidelity to precedent in the controlling joint opinion in *Planned Parenthood v. Casey*, reaffirming while modifying *Roe v. Wade*. Justices O’Connor, Kennedy, and Souter were moved by the need for continuity and stability in constitutional law, yet paradoxically they seemed to give this factor undue prominence relative to their conviction of the rightness of the actual decision—almost as if the decision could not stand on its own and needed an apology[;]

Emery G. Lee III, *Overruling Rhetoric: The Court’s New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 617 (2002):

The Court’s new overruling rhetoric appears to conceptualize the Justices’ role in a new way. Instead of merely owing a duty to adhere to the Constitution’s meaning, as they best understand it—however that meaning may be arrived at—under this new approach, Justices have to take the expectations of the American people and the Court’s own legitimacy into account. These expectations go beyond the belief in the rule of law and the subsequent need for continuity and stability on the law, although these are important considerations.

115. Justice Scalia noted later that the *Casey* treatment of stare decisis itself marked a deterioration of the rule of law. When the Supreme Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and struck down as unconstitutional a statute outlawing homosexual sodomy, Justice Scalia dissented and demonstrated how differently the Court was treating *Bowers* from how it had treated *Roe* in *Casey*. *Lawrence v. Texas*, 123 S.Ct. 2472, 2488–91 (2003) (Scalia, J., dissenting).

For example, in *Casey*, “when stare decisis meant the preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to reaffirm it.” *Id.* at 2488 (Scalia, J., dissenting). In *Lawrence*, “however, the widespread opposition to *Bowers*, a decision resolving an issue as ‘intensely divisive’ as the issue in *Roe*, is offered as a reason in favor of overruling it.” *Id.* at 2489 (Scalia, J., dissenting).

The *Casey* revision of stare decisis was simply a device to cover the Court’s exercise of its will to preserve *Roe*. The *Lawrence* Court had no will to preserve *Bowers*, but rather willed

Conclusion

One of the most chilling passages in the Bible—at least to a law professor—is a judgment pronounced by the prophet Habakkuk on the violation of the rule of law:

The burden which Habakkuk the prophet did see. O LORD, how long shall I cry, and thou wilt not hear! *even* cry out unto thee of violence, and thou wilt not save! Why dost thou shew me iniquity, and cause *me* to behold grievance? for spoiling and violence *are* before me: and there are *that* raise up strife and contention. Therefore the law is slacked, and judgment doth never go forth: for the wicked doth compass about the righteous; therefore wrong judgment proceedeth.

Behold ye among the heathen, and regard, and wonder marvelously: for *I* will work a work in your days *which* ye will not believe, though it be told *you*. For, lo, I raise up the Chaldeans, *that* bitter and hasty nation, which shall march through the breadth of the land, to possess the dwelling places *that are* not theirs. They *are* terrible and dreadful: their judgment and their dignity shall proceed of themselves.¹¹⁶

A polity that despises the rule of law is condemning itself to the rule of the lawless, those whose “judgment and . . . dignity . . . proceed of themselves.”¹¹⁷ For the rule of law is not only a principle built on religious foundations. It is also a touchstone of a people’s commitment to those religious foundations themselves. And those religious foundations have resting upon them far more than just the rule of law.

to abandon it, and so its opinions did “not bother to distinguish—or indeed, even bother to mention—the [*Casey*] paeon to *stare decisis* coauthored by three Members of [the *Lawrence*] majority.” *Id.* at 2488 (Scalia, J., dissenting). Justice Scalia concluded his remarks on this point: “To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey*’s extraordinary deference to precedent for the result-oriented expedient that it is.” *Id.* at 2491 (Scalia, J., dissenting).

116. *Habakkuk* 1:1–7 (Habakkuk cries in anguish to God for the wickedness he sees, and especially for the wicked departure from the rule of law. The law itself has become a tool of wickedness rather than a remedy for wickedness. God replies that he will send an invasion of Chaldeans to avenge these wrongs. But instead of restoring the rule of law, these invaders will subject God’s people to their own lawless rule, a rule marked by whatever judgment the rulers choose to give. God’s correction for evil is more evil still. Observers of contemporary American law will find scant comfort in this passage, at least for the short term.).

117. *Id.*